TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement of the Case	2
The Question is Substantial	5
Conclusion	18
Appendix A, Opinion of the District Court	19
Appendix B, Report of the Interstate Commerce Commission	25
Appendix C, Statutes involved—Sections 15(3), 15(4), 216(a), 216(b), 216(c), 216(g), 216(j), and 217(c) of the Interstate Commerce Act, 49 U.S.C. §§ 15(3)(4), 316(a)(b)-(c)(g)(j), 317(c)	35

AUTHORITIES CITED

CASES

Atchison Topeka & Santa Fe R. Co. v. Denver & New Orleans R. Co., 110 U.S. 667 (1884) 15

Cancellation of Rates & Routes via Short Lines, 245 I.C.C. 183 (1941) 14

Central Stock Yards Co. v. Louisville & Nashville R. Co., 192 U.S. 568 (1904) 15, 17

PAGE

Chicago & Northwestern Ry. Co. v. Osborne, 52 Fed. 912 (8th Cir. 1892) cert. den. 146 U.S. 354 15

Chicago, Milwaukee, St. Paul & Pacific R. Co. v. United States, 366 U.S. 745 (1961) 18

Dixie Carriers, Inc. v. United States, 351 U.S. 56 (1956) 2

East South Joint Rates & Routes Cancellation, 44 M.C.C. 747 (1945) 8

Express Cases, 117 U.S. 1 (1886) 6, 15

Gulf, Colorado & Santa Fe. Ry. Co. v. Miami Steamship Co., 86 Fed. 407 (5th Cir. 1898) 15

Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962) 17

Judd and Detweiler v. Baltimore & Ohio R. Co., 30 I.C.C. 455 (1914) 13

Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co., 37 Fed. 567 (Ky. 1889) 15

Little Rock & M. R. Co. v. St. Louis, I.M. & S. Ry. Co., 41 Fed. 559 (E.D. Ark. 1890) 15

Little Rock & M.R. Co. v. St. Louis Southwestern R. Co., 63 Fed. 775 (8th Cir. 1894) 15

Missouri Pacific R. Co. v. United States, 16 F. Supp. 752 (E.D. Mo. 1936) 11

Ocean-and-Rail Rates to Charlotte, N.C., 38 I.C.C. 405 (1916) 11

Ogden Gateway Case, 35 I.C.C. 131 (1916) 11

Oregon Short Line Ry Co. v. Northern Pacific R. Co., 61 Fed. 158 (9th Cir. 1894) 15

PAGE

Port of New York Authority v. Atchison, T. & S. F. Ry. Co., 144 I.C.C. 514 (1928) 11, 12

Rates on Cottonseed and Its Products, 28 I.C.C. 219 (1913) 11

Restrictions on Routings over S.L. & U.R.R., 115 I.C.C. 357 (1926) 11

Restrictions, Riss & Co. & Eliminations, Hi Way Motor 46 M.C.C. 290 (1946) 7, 8

Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (1959) 16

Routing from Points on S.C. & P. Ry., 142 I.C.C. 230 (1928) 11

Routing Sand and Gravel, 232 I.C.C. 525 (1939) 12

Routing on Sheep from K.C.M. & O. Texas Points, 69 I.C.C. 4 (1922) 11

Routing Via Hampton & Branchville R. Co., 148 I.C.C. 547 (1928) 12

St. Louis Drayage Co. v. Louisville & Nashville R. Co., 65 Fed. 39 (E.D. Mo. 1894) 15

Southeast Shippers Assn. v. Akers Motor Lines, 54 M.C.C. 770 (1952) 8

Stone From Missouri Points To Kellogg, Ill., 181 I.C.C. 1 (1931) 12

Strickroot v. Detroit & C. Nav. Co., 253 I.C.C. 535 (1942) 7, 8

Thompson v. United States, 343 U.S. 549 (1952) 13

United States v. Drum, 368 U.S. 370 (1962) 2

PAGE

United States v. Missouri Pacific R. Co., 278 U.S. 269 (1929) 18

Washington D. C. Store-Door Delivery, 27 I.C.C. 347 (1913) 12, 13

West Coast Lumber Mfrs. Assn. v. S.P. & S. Ry. Co., 45 I.C.C. 230 (1917) 11

Wight v. United States, 167 U.S. 512 (1897) 13

STATUTES

Interstate Commerce Act:

Sec. 2, 49 U. S. C. § 2 ..... 12, 13

Sec. 15(3), 49 U. S. C. § 15(3) 2, 5, 6, 10, 13, 14, 16, 18

Sec. 15(4), 49 U.S.C. § 15(4) 2, 5, 6, 10, 12, 13, 14, 16, 18

Sec. 216(a), 49 U. S. C. § 316(a) 2, 3, 9

Sec. 216(b) 49 U. S. C. § 316(b) 2, 9

Sec. 216(c), 49 U.S. C. § 316(c) 2, 7, 9, 10

Sec. 216(g), 49 U. S. C. § 316(g) ..... passim

Sec. 216(j), 49 U. S. C. § 316(j) 2, 16

Sec. 217(c), 49 U. S. C. § 317(c) 2, 3, 6

Part II, 49 U. S. C. §§ 301 et seq. 3, 12

Judicial Code

28 U. S. C. §§ 1253, 1336, 2101(b) 2284, 2321-2325 2

PAGE

Statutes at Large:

24 Stat. 379 15

34 Stat. 584, 590 ..... 10, 15, 17

36 Stat. 539, 552 10

54 Stat. 899, 911 14

54 Stat. 899, 924 14

MISCELLANEOUS

H. R. Report No. 2832, 76th Cong., 3d Sess. 14

19th Annual Report of Interstate Commerce Commission to Congress, 1905 16

In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

GREYHOUND LINES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
MISSOURI, KANSAS AND OKLAHOMA COACH LINES,
A Corporation,

Appellees.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court, 268 F. Supp. 746, is reproduced in Appendix A, *infra*, page 19. The report of the Interstate Commerce Commission has not been published but is printed in Appendix B, *infra*, page 25.

JURISDICTION

Appellant brought this action under 28 U.S.C. §1336 to annul and enjoin an order of the Interstate Commerce Commission. A District Court of three judges convened pursuant to 28 U.S.C. §§ 2284, 2321-2325, denied the relief sought. The judgment sought to be reviewed was entered on June 6, 1967, and notice of appeal was filed on July 14, 1967.

This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment of the District Court on direct appeal. *United States* v. *Drum*, 368 U.S. 370 (1962); *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956).

STATUTES INVOLVED

Sections 15(3), 15(4), 216(a), 216(b), 216(c), 216(g), 216(j), and 217(c) of the Interstate Commerce Act, 49 U.S.C. §§ 15(3), 15(4), 316(a), 316(b), 316(c), 316(g), 316(j), 317(c), are printed in Appendix C, *infra*, page 35.

QUESTION PRESENTED

In the absence of power in the Interstate Commerce Commission to compel motor common carriers of passengers to enter into arrangements for the honoring of each other's tickets at the ticket holder's option, does the Commission have authority under § 216(g) of the Interstate Commerce Act, 49 U.S.C. § 316(g), to forbid discontinuance of such arrangements that have been voluntarily established?

STATEMENT OF THE CASE

Appellant Greyhound, and appellee Missouri, Kansas And Oklahoma Coach Lines, a corporation (M. K. & O.), are motor common carriers of passengers operating over

various highway routes in interstate commerce under authority of Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.* At all times here involved appellant and M. K. &.O. have been engaged in so operating between St. Louis, Missouri, and Oklahoma City, Oklahoma, using largely the same highways and serving many common intermediate points. Since 1939 appellant and M. K. and O. have kept on file with the Interstate Commerce Commission their separate tariffs which authorize the optional honoring of the tickets of one carrier by the other carrier on the St. Louis-Oklahoma City route. Under these tariffs the holder of a ticket issued by one carrier may, at his option, use the ticket for service on the other carrier's buses between the common points of the two carriers on this route. The selling carrier reimburses the carrier performing the service for the value of the ticket less a ten per cent commission.

By schedules filed to become effective on August 1, 1965, appellant cancelled its above described tariff provisions for optional honoring. M. K. & O. filed a protest and the Commission suspended the operation of appellant's schedules. Thereafter, in the proceeding under review, M. K. & O. and appellant submitted written evidence and briefs. The Commission's order here in issue required appellant to cancel its protested schedules. This order compels appellant to leave in effect its tariff provisions which authorize optional honoring of its tickets by M. K. & O.

The Commission cited §§ 216(a), 217(c), and 216(g) of the Interstate Commerce Act, 49 U.S.C. §§ 316(a), 317(c), and 316(g). Section 216(a) requires the filing of tariffs providing for service, and § 217(c) requires 30 days notice of the cancellation of tariffs. These things appellant had done. The last sentence of § 216(g) is the following:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable."

The Commission held (1) that appellant was required to satisfy the burden of proof called for by that provision, and (2) that appellant had failed to do so. It is our position that the above quoted sentence from § 216(g) does not apply to the cancellation of the optional honoring arrangements here involved. The Interstate Commerce Act does not give the Commission power to compel carriers to enter into optional honoring arrangements, and the Commission in its report does not claim that it has that power and does not base its holding upon the premise that it has that power. It is a well settled common-law rule, recognized by the District Court, that where the Commission does not have power to compel carriers to enter into a joint traffic arrangement it may not forbid withdrawal from such an arrangement that has been voluntarily established. The Commission, of course, lacks the power to change the common law, and it followed this common-law rule for many years in cases involving the construction of § 216(g) and other sections of the Act until the decision here in issue. Accordingly, we say that § 216(g) does not authorize the Commission's order.

The District Court correctly stated the issues, as follows:

> "The crux of the controversy here is whether the Commission had jurisdiction to enter its order. It is plaintiff's position that the Commission could not have initially compelled plaintiff to institute an optional

> honoring provision in its tariff, and therefore it cannot forbid the cancellation of such a provision already on file. The Commission, on the other hand, insists that once plaintiff filed such a provision with the Commission, it submitted itself to the Commission's jurisdiction'' (268 F. Supp. at 747).

The Court sustained the Commission's position and denied appellant's request for injunction against the order.

THE QUESTION IS SUBSTANTIAL

As noted above, the Interstate Commerce Act does not give the Commission power to compel carriers to enter into optional honoring arrangements. The last sentence of § 216(g) was amended into its present form in 1940. 54 Stat. 899, 924. From the time of its amendment until the decision in issue here, the Commission held that § 216(g) did not authorize it to forbid a motor carrier to withdraw from a joint traffic arrangement with another carrier which the Commission could not have compelled the carriers to establish initially. The Commission followed a similar rule for many years in the construction of §§ 15(3) and 15(4) of the Interstate Commerce Act, 49 U.S.C. §§ 15(3), 15(4), which regulate railroad joint traffic arrangements, until § 15(3) was amended for the specific purpose of changing the rule as to railroads. The Commission's long continued holding was required by the common law. Now the Commission has reversed this long continued holding as it applies to § 216(g) without assigning any reason therefor and without aid of legislation.

The District Court's affirmance of the Commission's order is contrary to the common law and is not authorized by the Interstate Commerce Act. It creates an erroneous interpretation of the Act that is applicable over a wide

field. It establishes unwise policy; it will deter carriers from undertaking experiments in coordination with other carriers and in other public service by the fear that the Commission may refuse to permit them to discontinue experiments that prove unsatisfactory. Plenary consideration is warranted.

1. *The Commission's long continued construction of §216(g).* The Commission's long continued construction of §§ 216(g), 15(3), and 15(4), was not based upon a principle fashioned by the Commission within the range of its administrative expertise and discretion; instead, the Commission was following a well-established rule of the common law. We will describe this common-law rule in more detail later; we refer to it here to point to the principle that, whatever may be the extent of the Commission's authority to depart from its own decisions, it does not have power to change common-law rules; for that the Commission must look to Congress. *Express Cases,* 117 U.S. 1, 29 (1886). It will aid understanding of the issues if we first discuss the applicable decisions of the Commission and then show that they are in accord with and compelled by the common law.

The District Court stated: "The court recognizes the well-established principle enunciated by plaintiff that common law joint traffic arrangements voluntarily established may be withdrawn by any party thereto" (268 F. Supp. at 747). But the Court held that § 216(g), upon which the Commission relied, had superseded the common-law rule. Construing § 216(g) and the provision in § 217(c) which requires filing of notice of changes in tariffs, the Court said:

> "There would be little purpose in requiring the filing of all changes in the tariff and the grant of a

broad power to investigate such changes under Section 216(g) if, in the end, the Commission did not have the power to prevent the change from becoming effective" (268 F. Supp. at 748).

This conclusion is erroneous. It ignores the actual effect of the common-law rule noted by the Court, and it fails to take proper account of the construction of § 216(g) followed by the Commission before 1966. As shown by the cases cited below, carriers at times file tariffs setting up joint traffic arrangements which the Commission could not compel them to establish initially. It is of course true that a carrier electing to file such a voluntary tariff must give the statutory notice of its cancellation. But in such cases the Commission has held consistently, as to railroads before 1940 and as to motor carriers since 1940, that the provisions of the Act which require the filing and cancellation of tariffs, and hearings thereon, do not give the Commission power to forbid a carrier to withdraw from a joint traffic arrangement which the Commission could not have compelled the carrier to establish. That is the common-law rule.

Thus, in *Restrictions, Riss & Co., and Eliminations, Hi-Way Motor,* 46 M.C.C. 290 (1946), the Commission said:

> "Under section 216(c) of the act, we may not require motor common carriers of property to establish through routes and joint rates. Not having the right to require their establishment in the first instance, we have no power to require the continued maintenance of through routes and joint rates voluntarily established. *Strickroot* v. *Detroit & C. Nav. Co.,* 253 I.C.C. 535. Once through routes have been established, however, they remain open until the shippers and others interested are placed on notice that they have been closed. The mere cancellation of joint rates does not close the through routes over which they applied" (pp. 292-293).

The Commission observed in *Riss* that it was uncertain whether the carriers actually wished to close (discontinue) the through routes, and that until the routes were closed it had jurisdiction under § 216(g) to prescribe rates over the through routes, but it added that ". . . our findings herein shall be understood to be without prejudice to the closing of the existing through routes" (p. 293). In a later unpublished proceeding in the same case, it being shown that the carriers had discontinued the through routes, the Commission "vacated and set aside" its rate order made under § 216(g) and discontinued the proceeding. (See in the certified record the order of the Commission in *Riss, supra,* dated November 29, 1946.)

The Commission thus held in *Riss* that the provisions of § 216(g), upon which the Commission and the District Court relied here, did not empower it to forbid carriers to discontinue a joint traffic arrangement which the Commission could not have compelled initially.

In *Stickroot* v. *Detroit & C. Nav. Co.*, 253 I.C.C. 535 (1942), cited in the above passage from *Riss*, the Commission said:

> "The voluntary maintenance in the past of through routes and joint rates, partly by motor vehicle and partly by water, does not give us jurisdiction to require their continuance or reestablishment" (p. 538).

In accord with those cases are *East South Joint Rates and Routes, Cancellation,* 44 M.C.C. 747, 754 (1945), and *Southeast Shippers Assn.* v. *Akers Motor Lines,* 54 M.C.C. 770, 772 (1952).

While in those four cases paragraph (g) of § 216 is expressly mentioned only in *Riss*, the other three held that §216 contained no provision that authorized the Com-

mission to forbid carriers to discontinue joint traffic arrangements that the Commission could not compel initially. Thus, all four cases held that § 216(g) does not confer the power that the Commission is attempting to exercise in the case at bar.

The District Court said that those decisions are not applicable here because they involved motor carriers of property whereas the case at bar deals with passenger motor carriers (268 F. Supp. at 748). The Court contrasted § 216(c), which makes through routes and joint rates between property carriers permissive, with § 216(a), which makes such relationships and other regulatory provisions mandatory as to passenger carriers. But the Court overlooked § 216(b) which imposes upon property carriers all of the mandatory regulations contained in § 216(a) except compulsory through routes and joint rates. Thus, property and passenger motor carriers are subject to identical compulsory regulations except for the mandatory through route-joint rate requirement of § 216(a). Neither the Commission nor the Court claimed that the through route-joint rate provision of § 216(a) authorizes the Commission to compel optional honoring. And since in all other regulatory aspects passenger and property carriers are covered by similar mandatory provisions, the cases we cite which deal with the voluntary joint traffic arrangements of property carriers apply with equal force to the voluntary joint arrangements of passenger carriers for optional honoring. A common principle runs through our above cited authorities and the instant case: That in the *absence* of power, *however it comes about;* to compel carriers to enter into a joint traffic arrangement, there is *absence* of power to forbid the carriers to withdraw from it.

These considerations also answer the District Court's statement: "[E]xcept where the statute includes an express prohibition relating to certain traffic arrangements, the authority of the Commission to prevent changes in tariffs pursuant to Section 216(g) has consistently been recognized" (268 F. Supp. at 748). The Court cited no authority to support that theory, nor did the Commission's report. No such authority exists. There is no "express prohibition" of anything in § 216(c); there is only *absence of power* to compel joint traffic arrangements between property motor carriers similar to the *absence of power* in the Act to compel passenger motor carriers to establish optional honoring, with the consequences in each case of *absence of power* to forbid withdrawal from such arrangements.

2. *The Commission's long continued construction of §§ 15(3) and 15(4) of the Interstate Commerce Act.* The principle so applied in connection with motor carrier through routes and joint rates was followed by the Commission in dealing with similar joint arrangements between railroads from 1913 to 1940. Section 15(3) of the Interstate Commerce Act, 49 U.S.C. § 15(3), enacted in 1906, 34 Stat. 584, 590, authorizes the Commission under appropriate circumstances to compel railroads to enter into through routes and joint rates with each other and with water carriers. But § 15(4), enacted in 1910, 36 Stat. 539, 552, provides, with exceptions not here material, that in establishing a through route the Commission shall not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad . . . which lies between the termini of such proposed through route . . ." This is the provision that forbids the Commission to compel a railroad to "short-haul" itself. Construing these sections the Commission

held from 1913 to 1940 that where a railroad voluntarily entered into tariff arrangements for a through route that short-hauled it, the Commission could not prevent the railroad from cancelling the tariffs and thus discontinuing the through route.

The rule was stated in *Missouri Pacific R. Co.* v. *United States,* 16 F. Supp. 752, 758 (E. D. Mo. 1936):

> "It is practically conceded that, in general, the Commission has no power to prevent the cancellation of joint through rates if it could not compel the establishment of such joint rates in the first instance. The Commission itself has more than once so hold. *Ogden Gateway Case,* 35 I.C.C. 131 [1916]."

In *Ogden Gateway* the Commission said:

> "We think it clear that we have no power under section 15, nor should we assume the power, to prevent the cancellation of through routes and joint rates voluntarily established by the carriers when, as in this case, the circumstances and conditions are such as would not warrant an order to compel such arrangements if not already in effect" (35 I.C.C. pp. 140-141).

The principle involved came to be known as the *Ogden Gateway* rule. Other cases applying this principle are set out in note.[1]

---

[1] *Rates on Cottonseed And Its Products,* 28 I.C.C. 219, 222 (1913); *Ocean-and-Rail Rates to Charlotte, N.C.,* 38 I.C.C. 405, 410 (1916); *West Coast Lumber Mfrs. Assn.* v. *S. P. & S. Ry. Co.,* 45 I.C.C. 230, 234 (1917); *Routing on Sheep from K. C. M. & O. Texas Points,* 69 I.C.C. 4, 6 (1922). *Restrictions on Routings Over S. L. & U. R. R.,* 115 I.C.C. 357, 365 (1926); *Routing From Points On S. C. & P. Ry.,* 142 I.C.C. 230, 235 (1928); *Port*

The District Court said that the railroad cases had no application here because they dealt with the "short hauling" provision of § 15(4), whereas "No similar prohibition exists with respect to optional ticket honoring by motor carriers of passengers." (268 F. Supp. at 748). The Court's reasoning was patently erroneous because it failed to take into account that there was the same *absence of power* in the railroad cases to compel short hauling and to forbid its withdrawal when voluntarily established, as the *absence of power* to compel optional honoring and to forbid its cancellation. Those were the comparable features of the two situations; the comparison made by the Court was irrelevant.

The only case cited by the District Court is *Washington, D.C. Store-Door Delivery*, 27 I.C.C. 347 (1913). There is a typographical error in the District Court's citation; the case was decided in 1913; the year 1939 shown in the District Court's opinion is not correct. This may be worth noting since Part II of the Interstate Commerce Act was enacted in 1935. The Court said, citing that case: "[E]ven in cases involving motor carriers of property, the Commission has, where it found such action appropriate, refused to permit withdrawal of a voluntarily established service" (268 F. Supp. at 748).

That case is wide of the mark. The Commission held that § 2 of the Interstate Commerce Act, 49 U.S.C. § 2, which prohibits discrimination by railroads against shippers, would be violated by the railroads if they discontinued

---

of New York Authority v. *Atchison, T. & S. F. Ry. Co.*, 144 I.C.C. 514, 517-518 (1928); *Routing Via Hampton & Branchville R. Co.*, 148 I.C.C. 547, 552 (1928); *Stone From Missouri Points To Kellogg, Ill.*, 181 I.C.C. 1, 3 (1931); *Routing Sand and Gravel*, 232 I.C.C. 525, 526 (1939).

store-door delivery of freight in Washington while continuing to maintain it in Baltimore. So the railroads terminated the discrimination by discontinuing store-door delivery in *both* Washington and Baltimore. The Commission did not "refuse to permit withdrawal" of the service. What happened is described in a later case, *Judd & Detweiler* v. *Baltimore & Ohio R. Co.*, 30 I.C.C. 455, 456 (1914):

> "The matter of store-door delivery at Washington has been several times before this Commission: . . . *Washington, D.C. Store-Door Delivery*, 27 I.C.C. 347. In the case last cited we held that to discontinue the service at Washington while maintaining the same kind of service at Baltimore would cause undue discrimination, and our order required its continuance at Washington so long as maintained at Baltimore. *To comply with our order the carriers withdrew the service at both Baltimore and Washington, and the* withdrawal became effective September 1, 1913." (Emphasis supplied.)

Moreover, § 2 gives the Commission power to "compel every carrier to give equal rights to all shippers over its own road," *Wight* v. *United States*, 167 U.S. 512, 517 (1897). This explicit power to prevent discrimination is entirely different from the lack of power to compel optional honoring and the consequent lack of power to forbid its discontinuance.

3. *The legislative history of §§ 15(3) and 216(g).* At various times between 1910 and 1940 the Commission sought legislation either to repeal § 15(4) or to make §§ 15(3) and 15(4) less restrictive of the Commission's powers. See *Thompson* v. *United States*, 343 U.S. 549, 554-556 (1952). These efforts brought about enactment of provisions of the Transportation Act of 1940 which, by

amending § 15(3), gave the Commission, *inter alia*, power to forbid railroads to discontinue short hauling arrangements voluntarily established. See H.R. Rep. No. 2832, p. 71, 76th Cong., 3d Sess. The amendment (54 Stat. 899, 911) added the following sentence to § 15(3):

> "If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, *without regard to the provisions of paragraph (4) of this section.*" (Emphasis supplied.)

In *Cancellation of Rates and Routes via Short Lines*, 245 I.C.C. 183, 187-188 (1941), the Commission held that the last clause in the amendment (which we have italicized) ". . . makes it clear . . . that the limitations contained in section 15(4) upon our authority to require the *establishment* of joint through routes and rates do not apply to the *cancellation* of joint routes and rates already existent." (Emphasis is Commission's.)

The same Act (1940) that amended § 15(3) added to § 216(g) the very language upon which the Commission and the District Court relied. 54 Stat. 899, 924. H.R. Report no. 2832, pp. 71, 78, 76th Cong., 3d Sess. While the amendment to § 15(3) authorized the Commission to forbid cancellation of certain joint railroad traffic arrangements even though the Commission lacked power to compel their institution, the amendment to § 216(g) contained no corresponding authority as to motor carriers, and the Commission has always held, up to this case, that §216(g)

does not empower it to compel the continuation of motor carrier joint traffic arrangements which it could not compel initially.

4. *The common-law principle.* At common law a common carrier may not be compelled to enter into arrangements with another common carrier for the handling of either passenger or freight traffic, and may not be compelled to continue such arrangements if voluntarily made.[2] As some of the authorities in the note demonstrate, although the Interstate Commerce Act was enacted in 1887, 24 Stat. 379, the Interstate Commerce Commission was without power to compel any joint traffic arrangements between railroads until it was specifically given that power by the amendment of 1906, 34 Stat. 584, 590,[3] now as further

---

[2] *Atchison, Topeka & Santa Fe R. Co.* v. *Denver & New Orleans R. Co.*, 110 U.S. 667, 680 (1884); *Express Cases*, 117 U.S. 1, 27, 29 (1886); *Central Stock Yards Co.* v. *Louisville & Nashville R. Co.*, 192 U.S. 568, 569, 571 (1904); *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559, 562-563 (E. D. Ark. 1890); *Oregon Short Line Ry. Co.* v. *Northern Pacific R. Co.*, 61 Fed. 158, 162 (9th Cir. 1894); *Chicago & Northwestern Ry. Co.* v. *Osborne*, 52 Fed. 912, 915 (8th Cir. 1892), cert. den. 146 U.S. 354; *Little Rock & M. R. Co.* v. *St. Louis Southwestern R. Co.*, 63 Fed. 775 (8th Cir. 1894); *Gulf, Colorado & Santa Fe Ry. Co.* v. *Miami Steamship Co.*, 86 Fed. 407, 416 (5th Cir. 1898); *Kentucky & Indiana Bridge Co.* v. *Louisville & Nashville R. Co.*, 37 Fed. 567, 629 (Ky. 1889); *St. Louis Drayage Co.* v. *Louisville & Nashville R. Co.*, 65 Fed. 39, 41-42 (E. D. Mo. 1894).

[3] 34 Stat. 590: "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have

amended 49 U.S.C §15(3)(4). In 1905 the Interstate Commerce Commission summarized the then existing legal situation in its 19th Annual Report to Congress:

> "[C]onnecting carriers are now under no legal obligation to establish through routes or joint rates and may at their pleasure withdraw from such arrangements when they have actually been entered into" (pp. 9-10).

As noted above, the District Court recognized the validity of this common-law principle but held that it was superseded as to the issues in this case by § 216(g). This is an erroneous holding. Neither the Commission nor the District Court were able to point to a statute that authorized the Commission to compel carriers to establish optional honoring arrangements. Until such a statute is identified the common-law right survives to discontinue optional honoring voluntarily established. As shown above, the Commission held from 1942 and until the case at bar that § 216(g) did not authorize it to forbid carriers to withdraw from joint traffic arrangements which the Commission could not have compelled initially, and this is obviously the correct construction of the Act. For no statute is "to be construed as making any innovation upon the common law which it does not fairly express." *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 304-305 (1959).

Section 216(j) of the Act, 49 U.S.C. § 316(j), provides:

> "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

---

refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

This provision recognizes the survival of common-law rights and remedies, *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and among these is the common law right of a carrier to withdraw from a joint traffic arrangement which the Commission could not compel the carrier to establish.

The courts have always exercised care to avoid infringement upon the common-law right of a carrier not to be compelled to enter into or to continue a joint traffic arrangement with another carrier, in the absence of specific statutory language compelling such relationships. See cases cited in note 2, *supra*. *Central Stock Yards Co.* v. *Louisville & Nashville R. Co.*, 192 U.S. 568 (1904), furnishes a good example. There it was contended that one railroad could be compelled to deliver its loaded cars to another railroad by force of provisions of the Interstate Commerce Act requiring railroads "to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of property to and from their several lines and those connecting therewith" (p. 569). The Court held that this language was not enough to supersede the common-law principle. The Court said (p. 571), citing many of the cases contained in note 2, *supra*, that one railroad "cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant or to require it to make one."

It was not until the enactment of the specific language of the amendment of 1906 to the Act, note 3, *supra*, that the Commission had the power to compel railroads to establish through routes and joint rates. Since 1906 this Court has carefully required observance of the common-

law rights left surviving by the through route-joint rate statutes, 49 U.S.C. § 15(3)(4). See, *e.g.*, *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269 (1929) and *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 366 U.S. 745 (1961).

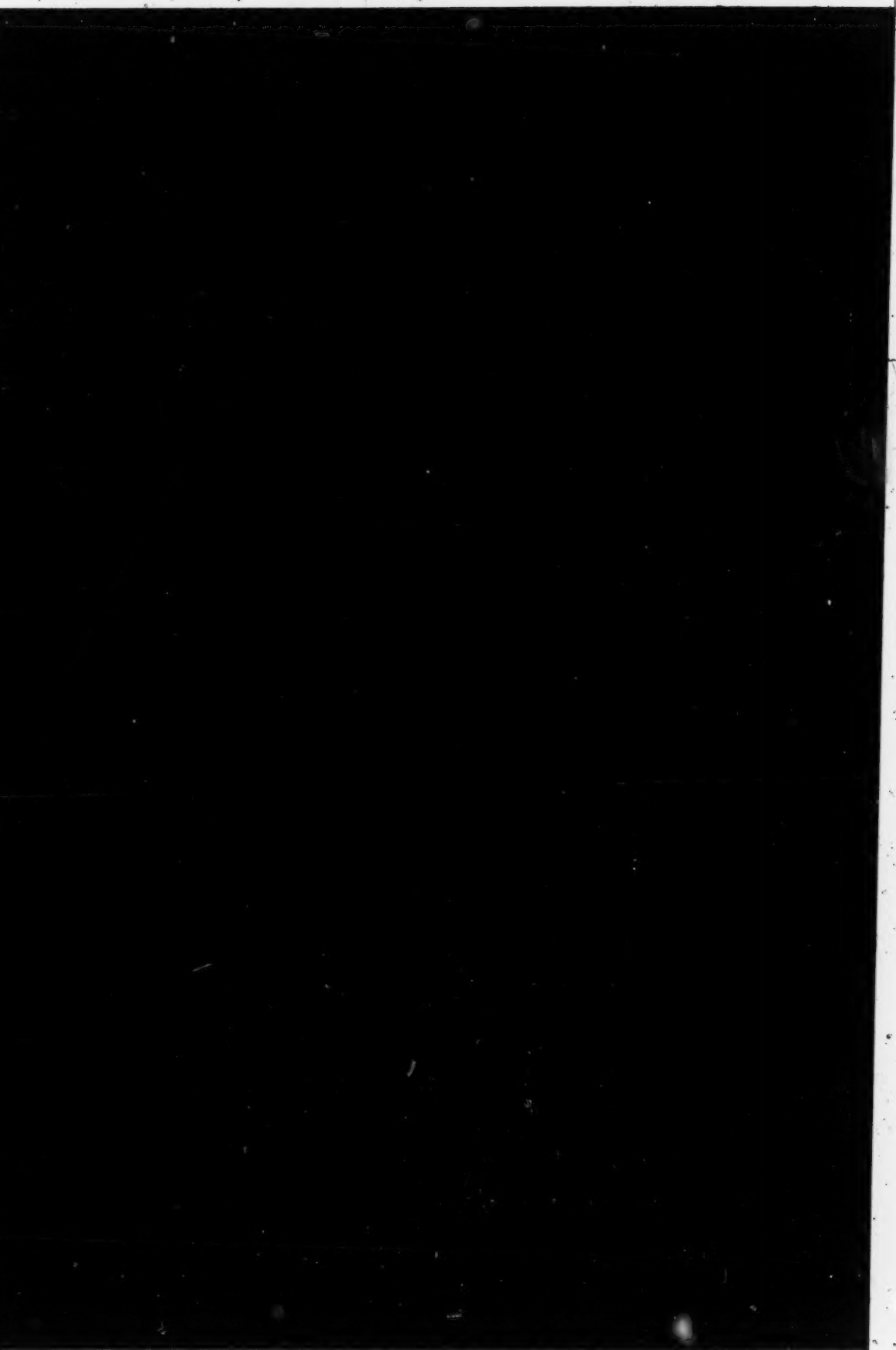
Appellant's common-law right to discontinue its optional honoring arrangements here involved should also be protected.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

AMOS M. MATHEWS
ROBERT J. BERNARD
Attorneys for Appellant



APPENDIX A

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

GREYHOUND LINES, INC., a corporation,
Plaintiff,

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Defendants.

MISSOURI, KANSAS AND OKLAHOMA COACH LINES, a corporation,
Intervenor.

No. 66 C 770

OPINION

Before Fairchild, Circuit Judge, and Austin and Will, District Judges.

WILL, *District Judge*:

Plaintiff, Greyhound Lines, Inc (Greyhound), invokes this three-judge court to annul and set aside the Interstate Commerce Commission's Report and Order of January 19, 1966, denying Greyhound leave to cancel a tariff theretofore in force permitting optional honoring of tickets by Greyhound and Missouri, Kansas & Oklahoma Coach Lines (M K & O), and to permanently enjoin its enforcement. In substance, the Commission refused Greyhound leave to cancel the optional honoring provision which it has had with M K & O since 1939, some twenty-six years, whereby either line honored the tickets issued by the other line, be-

tween St. Louis, Missouri, and Oklahoma City, Oklahoma, and points in between. M K & O filed its protest against the cancellation, before the Commission and has intervened in these proceedings. All parties have filed exhaustive briefs.

Greyhound and M K & O are motor common carriers of passengers operating over various highway routes in interstate commerce under authority of Part II of the Interstate Commerce Act, 49 U.S.C. §§ 301, *et seq.* Greyhound has entered into individual agreements with various motor carriers, including M K & O, whereby the carriers mutually honor the tickets of each other for passenger serivce between common points they are authorized to serve. These arrangements are widespread in the transportation industry, most notably amongst all airlines, and are generally known as "optional honoring" arrangements. The ticketholder is thereby offered the right and convenience of taking whichever carrier he chooses, without regard to which carrier originally issued the ticket, or if a connecting carrier issued the ticket, without regard to which of the two carriers serving this route is shown on the ticket as being the carrier for this portion of the trip.

The crux of the controversy here is whether the Commission had jurisdiction to enter its order. It is plaintiff's position that the Commission could not have initially compelled plaintiff to institute an optional honoring provision in its tariff, and therefore it cannot forbid the cancellation of such a provision already on file. The Commission, on the other hand, insists that once plaintiff filed such a provision with the Commission, it submitted itself to the Commission's jurisdiction.

Further, it contends that the optional honoring provision pertains to the "value of service" to passengers as

to which the statute, Section 217 (c), 49 U.S.C. § 317 (c), requires a proposed change to be filed with the Commission.

I

Greyhound's jurisdictional challenge rests on the argument that at common law a carrier may not be compelled to enter into traffic arrangements with other common carriers and, accordingly, cannot be compelled by the Commission to continue these arrangements. Secondarily, Greyhound argues that it has been consistent Commission policy not to prevent the withdrawal of a joint traffic arrangement voluntarily established and that to do so in this instance would be contrary both to the statute and well-established Commission policy.

The court recognizes the well-established principle enunciated by plaintiff that common law joint traffic arrangements voluntarily established may be withdrawn by any party thereto. The cases cited by Greyhound in support of this position, however, are either decisions before the passage of the Act of 1887, before the 1906 amendment thereto, or prior to the enactment in 1935 of Part II of the Act covering motor carriers. Notwithstanding the validity of the common law principle, where a broad statutory provision such as the Interstate Commerce Act is intended to substantially govern the relationships between the carriers and the public, the Act itself compels primary reliance on its provisions in determining the validity of any proposed changes in tariffs filed thereunder. Under the Act, two separate and distinct questions are involved in cases such as this: (1) whether the Commission has the authority to compel entry into an optional honoring arrangement, and (2) whether, if entered into voluntarily, the Commission can prevent withdrawal therefrom.

Turning to the statute, we note first that Section 217 (a), 49 U.S.C. § 317(a), requires motor carriers of passengers to file proposed rules in connection with fares and charges. Any proposed change in an existing tariff is subject to the provisions of Section 217 (c), which requires notice to the Commission. Pursuant to Section 216 (g), new rates, fares or charges pertaining to the transportation of passengers or property by a motor common carrier may be investigated by the Commission and the proponents thereof required to prove that the effect of the rate or charge or the value of service thereunder is just and reasonable.

There would be little purpose in requiring the filing of all changes in the tariff and the grant of a broad power to investigate such changes under Section 216 (g) if, in the end, the Commission did not have the power to prevent the change from becoming effective. Indeed, except where the statute includes an express prohibition relating to certain traffic arrangements, the authority of the Commission to prevent changes in tariffs pursuant to Section 216 (g) has consistently been recognized.

In support of its contention that the Commission cannot require the continuance of something which it could not have ordered in the first instance, Greyhound cites a number of cases, none of which are applicable here. Some involve provisions of the Act dealing with through railroad routes and which specifically prohibit the Commission from establishing through routes which result in short hauling one of the participating railroads. No similar prohibition exists with respect to optional ticket honoring by motor carriers of passengers. Other cases cited by Greyhound involve the establishment of through routes between motor carriers of property or a motor carrier of property and a water carrier. The Commission's authority with respect

to such carriers arise under Section 216 (c), 49 U.S.C. § 316 (c), which is permissive and provides "Common carriers of property by motor vehicle may establish. . . ." (Underscoring supplied.) Section 216 (a), with respect to possenger motor carriers, is mandatory and reads, "It shall be the duty of every common carrier of passengers by motor vehicle to establish. . . ." No case involving a passenger carrier has been cited by Greyhound.

Moreover, even in cases involving motor carriers of property, the Commission has, where it found such action appropriate, refused to permit withdrawal of a voluntarily established service. See Washington, D.C. Store-Door Delivery, 27 I.C.C. 347 (1939).

II

Since Greyhound's challenge in this court is based solely upon the jurisdiction of the Commission to cancel the optional honoring arrangement between it and M K & O, it presented no argument to rebut the conclusion of the Commission that cancellation of optional honoring between these two carriers would reduce the utility of the ticket and affect the value of service under the fare paid. Thus, we need not dwell on the Commission's ultimate conclusion for it has not been challenged herein, but we note in passing that the Commission made extensive findings in support thereof.

In addition, evidence was presented to the Commission tending to show that since 1962 Greyhound has attempted in one manner or another to eliminate M K & O's competition along the St. Louis-Oklahoma City route. It first attempted to purchase a substantial share in M K & O. Failing that, it instituted a number of changes relating to the scheduling of its vehicles along the route which have hampered M K & O in its operations. The Commission

concluded that elimination of the optional honoring arrangement would be a further step in the process of making more difficult M K & O's ability to compete effectively with the larger and more resourceful carrier, Greyhound. Thus, not only would the utility of the ticket in the hands of the passenger be diminished by the proposed cancellation, but almost certainly substantial unfavorable consequences for M K & O would be the ultimate result. We by no means infer that optional honoring itself is not an important benefit to the traveling public, for it was established before the Commission that numerous benefits accrue under such a joint traffic arrangement. The widespread effects of the proposed cancellation undoubtedly support the Commission's conclusion that Greyhound failed to meet its burden of proving the reasonableness of the change. With that position we are in complete agreement.

Conclusion

We hold that the Commission had the power to prevent Greyhound from withdrawing from the optional honoring arrangement with M K & O, notwithstanding the fact that this arrangement was initially voluntarily established by the two carriers. The order of the Commission is therefore affirmed. An appropriate order will enter denying plaintiff's motion to enjoin and set aside the order of the Interstate Commerce Commission.

Thomas E. Fairchild
United States Circuit Judge
R. B. Austin
United States District Judge
Hubert J. Will
United States District Judge

May 31, 1967

APPENDIX B

This report will not be printed in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
JANUARY 27, 1966

INVESTIGATION AND SUSPENSION DOCKET
NO. M-19841
OPTIONAL HONORING OF BUS TICKETS,
GREYHOUND AND M.K.&O.

Decided January 19, 1966

Cancellation of tariff provisions under which Central Division of Greyhound Lines and Missouri, Kansas and Oklahoma Coach Lines mutually honor each other's tickets, at the option of the ticket holder, for passenger service between Okalhoma City, Okla., and St. Louis, Mo., and at common points intermediate thereto, found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

Robert J. Bernard, Frank H. Jaques, and *Vernon Roberts* for respondent.

John L. Arrington, Jr., Robert A. Huffman, and *William A. Roberts* for protestant.

P. J. Campbell for intervenor.

REPORT AND ORDER OF THE COMMISSION

RATES AND PRACTICES REVIEW BOARD, MEMBERS BROWN, ROCK, AND DOWNS.

BY THE BOARD:

The modified procedure was followed. Due and timely execution of our functions under section 216(g) of the Interstate Commerce Act imperatively requires the omission of a recommended report and order in this proceeding. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on August 1, 1965, the respondent, Central Division of Greyhound Lines, Inc., hereinafter referred to as Greyhound, proposed to cancel tariff provisions under which Greyhound and M. K. and O. Lines (doing business as Missouri, Kansas and Oklahoma Coach Lines, a corporation) mutually honor the tickets of each other for passenger service between Oklahoma City, Okla., and St. Louis, Mo., and all intermediate common points. While the practice is referred to as optional honoring, the ticket-holder exercises the "option" and the ticket issued by one carrier is honored for the service by the other. Therefore, where the term "optional honoring" is used in this report it means the honoring by Greyhound of a ticket for passenger service issued by M. K. and O., or vice versa, when a passenger exercises his option of tendering his Greyhound or M. K. and O. ticket, as the case may be, for transportation over the other bus line. Upon protest of M. K. and O., the operation of such schedules was suspended to and inculding February 28, 1966:[1] (M. K. and O. is also a nominal respond-

[1] The proposed cancellation of similar provisions concerning intrastate passenger tickets was suspended by the state authorities.

ent because of the mutuality of the provision.) Greyhound presented evidence in support of the adjustment and M. K. and O. in opposition thereto. The National Bus Traffic Association, Inc., the tariff publishing agent, intervened merely to indicate that it would comply with the ultimate findings.

Following Greyhound's reply to M. K. and O.'s statement of facts and argument, M. K. and O. filed a motion for leave to file additional affidavits, along with such affidavits, in reply to Greyhound's reply statement filed under the modified procedure, to correct misstatements or misleading statements and to rebut new evidence in such reply statement. The so-called new evidence in Greyhound's reply statement is in rebuttal to M. K. and O.'s evidence as to "hustling of passengers"[2] and the impartial operation of the Tulsa, Okla., terminal. No good and sufficient reason is shown for permitting a reply to the rebutting evidence, and the motion to this extent is denied. However, M. K. and O.'s motion to admit new evidence to correct alleged misstatements or misleading statements in Greyhound's reply relative to the sale of tickets at intermediate terminals, the closing of such terminals when M. K. and O.'s buses pass through, and M. K. and O.'s operating income for the first half of 1965, is granted, and such additional information will be considered.

The primary issues in this proceeding are whether the Commission has jurisdiction over such optional honoring provisions, and if so, whether the cancellation herein of such provisions is just and reasonable.

---

[2] "Hustling of passengers" is a phrase used by certain witnesses to describe the action of a carrier's employee "going out to incoming buses and soliciting passengers" to use a particular transportation service.

M. K. and O. operates between St. Louis and Oklahoma City over highways through Springfield and Joplin, Mo., and Tulsa; it also operates between Tulsa and Coffeyville, Kans., and in Oklahoma north and west of Tulsa and Oklahoma City. Greyhound operates, with connections, between various points in the United States, and between St. Louis and Oklahoma City over the same highways as M. K. and O., except between Springfield and Joplin, where the two carriers operate over separate but parallel highways. The carriers use the same terminals along that portion of the highway between St. Louis and Oklahoma City over which they both operate. M. K. and O. uses the Greyhound terminals at St. Louis, Springfield, and Joplin, and Greyhound uses the M. K. and O. terminal at Tulsa, which displays the Greyhound emblem. The terminal at Oklahoma City is owned by several carriers in equal shares, but Greyhound owns an interest in two of the other carriers. At smaller communities along the routes, the same independent agents handle tickets and baggage for both carriers for a commission.

In 1939, Greyhound and M. K. and O. instituted the optional honoring of tickets over their common route between St. Louis and Oklahoma City. For many years they coordinated their schedules. While the statements are in dispute, and it is not clear who took the initiative, it appears that in 1962 there was a discussion bearing on Greyhound's acquisition of either a part interest in M. K. and O., or in Oklahoma Transportation Company and its affiliates, if the latter were acquired by M. K. and O. In any case, M. K. and O. marks the decline in its cooperative relationship with Greyhound from that approximate time. In 1963, Greyhound made schedule changes which, it is claimed, were detrimental to M. K. and O., and beginning

in 1964 the former canceled through-service arrangements with the latter, and instituted new schedules without coordination. M. K. and O. then scheduled buses to leave major terminals just ahead of Greyhound's, and the latter contends that this is conducive to "hustling" passengers.

There is much evidence concerning difficulties in the relationship between the two carriers which has no direct bearing on the issues in this proceeding. Greyhound maintains optional honoring provisions with numerous other carriers, but at this time proposes only to cancel the arrangement with M. K. and O. In addition to such provisions, Greyhound has followed a general policy of authorizing its agents to validate Greyhound tickets for use on the lines of other carriers, and it states that such a policy would apply to M. K. and O. if the optional honoring is canceled as proposed. Under that policy, passengers who purchase tickets from Greyhound and wish to use them on the M. K. and O., would be required to take their tickets to a Greyhound agent who would validate the ticket for use on the M. K. and O. by attaching a sticker to the coupon and inserting that carrier's name.

M. K. and O. cannot economically maintain its own terminals, and it uses the Greyhound terminals because of the large number of connections which are available at those points.[3] However, Greyhound imposes certain restrictions. For instance, only Greyhound employees are permitted to sell tickets at the St. Louis, Springfield, and Joplin terminals—M. K. and O. drivers may sell them

[3]An antitrust decree of June 27, 1957, by the United States District Court, Northern District of Illinois, Eastern Division, in Civil Action No. 57C1107, requires Greyhound to permit other carriers to remain in its terminals.

only in emergencies—and M. K. and O. may not have supervisory employees wearing uniforms or other identification on the premises. At St. Louis, M. K. and O. may not sell tickets for transportation over any portion of its route between St. Louis and Oklahoma City at any place in St. Louis, except at Greyhound terminal. This has prevented M. K. and O. from serving the Trailways terminal in St. Louis since 1964; it had previously served that terminal for over 30 years.

M. K. and O. tickets have not always been available at the intermediate terminals along the common route, and where both carriers' tickets are available, Greyhound is selling a greater number of its own tickets than those of M. K. and O. because of its greater number of daily schedules and the efforts of its sales representatives. On the other hand, at M. K. and O.'s Tulsa terminal, tickets are sold for the next departing bus, which may be a M. K. and O. bus, even though the passenger's ultimate destination is on Greyhound's lines, which would require transfer at an intermediate point.

M. K. and O.'s passenger revenues declined from $1,078,482 in 1962 to $1,021,954 in 1963, $878,115 in 1964, and to an estimated $807,865 in 1965.[4] In 1964, for both interstate and intrastate service, M. K. and O. received $236,600 from the honoring of Greyhound's tickets, and in 1965, the corresponding estimated revenue is $207,590. In the month of July, 1965, M. K. and O. buses transported 2,722 interstate passengers on Greyhound tickets, representing

[4]Although there was an increase in income in the first six months of 1965, this resulted principally from crediting expenses with depreciation which arose from the sale of several buses.

revenue to M. K. and O. of $13,699.78. Projecting those results at the same percentage relationship which the July 1964 revenues bore to total 1964 revenues, would produce 1965 totals of 27,212 interstate passengers and $136,956.71 in revenue. If there had been no income from this source in 1964, M. K. and O.'s operations would have resulted in a net loss of approximately $50,000 rather than net revenue of $187,754.

M. K. and O. is the only local bus line operated in the Oklahoma area north and west of Tulsa and Oklahoma City, and that service is subsidized by its operation between St. Louis and Oklahoma City.

DISCUSSION AND CONCLUSIONS

Greyhound takes the position that the Interstate Commerce Commission has no jurisdiction over the optional honoring of tickets, and that the cancellation of the tariff provisions providing for this service cannot be prevented, since it does not affect reasonable through routes, joint rates, nor the interchange of passengers, except to the extent that the passengers may be required to secure approval from the agents so as to change from Greyhound to M. K. and O. buses. In this connection, the mandatory provisions of section 216(a) of the act read in part as follows:

> It shall be the duty of every common carrier of passengers by motor vehicle * * * to establish, observe and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce * * *.

Section 217(c) of the act requires 30 days' public notice prior to any change in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, "or the value of the service thereunder," specified in any effective tariff of a common carrier by motor vehicle; section 216(g) authorizes the Commission to investigate and to suspend for seven months any such change, and places the burden of proof upon the carrier proposing the change to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The question here is whether the cancellation of a tariff item providing for the optional honoring of tickets affects the value of the service under the fare, and is thus a matter for regulation under the act. We are of the view and find that elimination of the option now residing in the ticket purchaser of using the services of either carrier would reduce the utility of the ticket, and thus affect the value of the service under the fare paid. Compare *Restriction to Through Routes, Thunderbird Transp. Co.*, 313 I.C.C. 271, 273.

We conclude that the Commission has jurisdiction to consider the proposal and that the burden of proof to show that the effect thereof upon the traveling public is just and reasonable rests upon the proponent.

Greyhound urges that the cancellation of optional honoring will permit it to operate its bus line and retain the passenger traffic which it developed, rather than to subsidize M. K. and O.'s operations with such traffic; also, that the cancellation will assist in settling the disputes between Greyhound and M. K. and O. regarding "hustling" and other terminal matters. Greyhound observes that with optional honoring the two carriers' operations between St.

Louis and Oklahoma City have remained about the same, while the operations of Continental American, a competing carrier between the same points over the same route, have increased from 1 to 5 schedules with no optional honoring. It claims that the cancellation will not effect any change in through routes or joint fares, and that uder its policy of permitting passengers to use its tickets on other bus lines, the passenger will still have "optional honoring" simply by taking the Greyhound ticket to the Greyhound agent for approval. M. K. and O. contends that optional honoring between it and Greyhound is necessary and desirable and required by the public interest.

Optional honoring makes available to the passenger a larger number of scheduled buses. The obtaining of approval for use of a ticket on another line is an inconvenience to the passenger, and might cause him to miss a bus, or to lose his seat on a bus, or his place in a waiting line. Moreover, desired approval of tickets might be impossible at some of the intermediate points which the M. K. and O. buses pass through, since the terminals are then closed and Greyhound agents are not available, and it is conceivable that higher fares would result.

Greyhound and M. K. and O. have practiced optional honoring for over 26 years. The competition between those lines is the primary reason for the cancellation now proposed. While it is true, as Greyhound states (citing *Crown Coach Co.* v. *Mo-Ark Coach Line, Inc.*, 27 M.C.C. 746, 750, concerning a complaint seeking the prescription of a through route), that it has no duty to establish a provision merely to enable another carrier to share the passengers it could handle, under section 216(g) it is charged with the burden of proving that a change in established

rules is just and reasonable. The record shows that the public makes considerable use of the option now available, and it is clear that the revenue obtained by M. K. and O. from providing optional service is of great importance to it. Even impartial observance, in connection with the M. K. and O., of Greyhound's "policy" of freely validating its tickets for use over other lines would reduce the value of the service now available to the public. We conclude that Greyhound has not sustained its burden of proof. *Cf. Restriction to Through Routes, Thunderbird Transp. Co., supra.*

We find that the proposed cancellation of the optional honoring provision is not shown to be just and reasonable.

It Is Ordered, That the respondents herein be, and they are hereby, notified and required to cancel, on or before March 10, 1966, the schedules described in the order entered in this proceeding by the Commission, Division 2 Acting as an Appellate Division, on July 30, 1965, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under Section 217 of the Interstate Commerce Act and that this proceeding be, and it is hereby, discontinued.

By the Commission, Rates and Practices Review Board.

H. Neil Garson
Secretary

(SEAL)

APPENDIX C

Sections 15(3), 15(4), 216(a), 216(b), 216(c), 216(g), 216(j), and 217(c) of the Interstate Commerce Act, 49 U.S.C. §§ 15 (3)(4), 316(a)(b)(c)(g)(j), 317(c).

Sec. 15(3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Sec. 15(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require

any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 216(a). It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facili-

ties for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 216(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Sec. 216(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges

it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 216(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding

instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

Sec. 216(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

Sec. 217(c) No change shall be made in any rate, fare, charge, or classification, or any rule, regulation, or practice affecting such rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle, except after 30 days' notice of the proposed change filed and posted in accordance with paragraph (a) of this section. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. The Commission may, in its discretion and for good cause shown, allow such change upon notice less than that herein specified or modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 27 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC.,
Appellant,

VERSUS

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and MISSOURI, KANSAS AND OKLAHOMA COACH LINES, a Corporation,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

JOHN L. ARRINGTON, JR.
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

Attorney for Appellee
Missouri, Kansas and Oklahoma
Coach Lines, a Corporation

Of Counsel:

STEPHANIE K. BARTLETT
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

September, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

TABLE OF CONTENTS

	PAGE
Citations	i
Statement of the Case	1
The Question Presented Is Not Substantial	6
Conclusion	11

CITATIONS

Judicial Decisions

American Trucking Ass'n v. United States, 344 U.S. 298 (1953)	10
B&O R.R. Co. v. Hamburger, 155 F. 849 (C.C.E.D. Va. 1907)	9
Greyhound Lines, Inc. v. Corporation Comm'n, 430 P.2d 1 (Okla. 1967)	4 n. 1
United States v. American Railway Express Co., 265 U.S. 425 (1924)	10
United States v. Pennsylvania R.R. Co., 323 U.S. 612 (1945)	9
United States v. The Greyhound Corporation, Civil Action No. 57-C-1107 (N.D. Ill., June 27, 1957)	5 n. 2

Administrative Proceedings

Optional Honoring—Greyhound-MK&O, Case No. B-24,122 (Mo. Pub. Serv. Comm'n, January 28, 1966)	4 n. 1

Statutes

Interstate Commerce Act

Sec. 15(3), 49 U.S.C. § 15(3)	8
Sec. 15(4), 49 U.S.C. § 15(4)	8

INDEX CONTINUED

PAGE

Motor Carrier Act of 1935, 49 U.S.C. §§ 301-27 9
Sec. 216(a), 49 U.S.C. § 316(a) 7
Sec. 216(c), 49 U.S.C. § 316(c) 8
Sec. 216(e), 49 U.S.C. § 316(e) 7, 9, 10
Sec. 216(g), 49 U.S.C. § 316(g) 7, 9, 10
Sec. 217(a), 49 U.S.C. § 317(a) 6, 7, 10
Sec. 217(c), 49 U.S.C. § 317(c) 6, 7, 10

Statutes at Large

Interstate Commerce Act § 15(3), as amended, 54 Stat. 911 (1940) 8-9

In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC.,
Appellant,

VERSUS

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and MISSOURI, KANSAS AND OKLAHOMA COACH LINES, a Corporation,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Missouri, Kansas and Oklahoma Coach Lines, a corporation, an appellee herein, moves that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

The factual background of this case is outlined in some detail in the decision of the Interstate Commerce Commission (the Commission) which is reproduced as Appendix B to appellant's Jurisdictional Statement (J.S. at 26-31, here-

inafter cited as J.S. App.). In essence, Greyhound Lines, Inc. (Greyhound), the appellant, is seeking to cancel its tariff filings with the Commission which provide for interchangeability of tickets between Greyhound and appellee Missouri, Kansas and Oklahoma Coach Lines (MK&O).

The practice in dispute here, optional honoring of tickets, is an arrangement by which one carrier can accept a ticket for transportation issued by, or designating, another carrier for a point or points served by both carriers. The "option" is the passenger's, which means that the passenger chooses which carrier and which schedule he chooses to ride at any particular time, without regard to which of the two carriers serving this route is shown on the ticket as being the carrier for this portion of the route.

If one of the carriers honors a ticket issued by the other, at the end of the month the ticket so honored is included in a claim, called a reclaim, which is submitted by the carrier which furnished the transportation to the carrier which sold the ticket; the carrier which sold the ticket deducts 10% as its sales commission and pays the rest of the price which the passenger paid for the ticket to the transporting carrier. If the ticket was sold by a connecting carrier, then the reclaim is made by the transporting carrier against the carrier which originally sold the transportation, which then remits the appropriate amount for that portion of the route over which the claiming carrier transported the passenger, less the sales commission of 10%. (Statement of MK&O Witness Hicks filed with ICC 9/30/65, ¶¶ 10-11 at 5-6, hereinafter cited as Hicks.)

Optional honoring is not unique to the bus industry; the scheduled air carriers have universally adopted this practice (MK&O ICC Ex. 6, such exhibits being hereinafter cited as MK&O Ex.).

From 1935 until the present time, MK&O, a small, family-owned independent bus company, has operated over the route between St. Louis, Missouri and Oklahoma City, Oklahoma, serving the cities of Joplin and Springfield, Missouri and Tulsa, Oklahoma en route. MK&O also serves an extensive area in north central Oklahoma where it furnishes the only public transportation service (Hicks ¶ 4 at 2-3 and MK&O Ex. 1). Greyhound serves substantially the same St. Louis-Oklahoma City route.

Beginning in 1939, MK&O and Greyhound instituted the practice of optional honoring of tickets and operated out of the same terminals and stations. However, after MK&O rebuffed a Greyhound attempt to purchase an interest in MK&O in 1962, the relationship between the two carriers began to deteriorate (J.S. App. at 28-29). In 1963 and 1964 Greyhound instituted new schedules which intercepted substantially all of MK&O's former connections with incoming carriers at Tulsa and Oklahoma City, cancelled its joint St. Louis-Texas through-bus operations with MK&O and ceased showing MK&O's schedules in Greyhound's published schedules (Hicks ¶¶ 32-33 at 16-17; Statement of MK&O Witness Allen filed with ICC 9/30/65, ¶¶ 33-34 at 32-33, hereinafter cited as Allen). As a result of these Greyhound actions, MK&O's revenues declined almost 20%, from $1,078,482 in 1962 to $878,115 in 1964 (Allen ¶ 34 at 33).

After administrative relief against Greyhound's schedule changes was finally denied in May, 1965, in June, 1965, MK&O instituted its own new schedules in an attempt to compete more effectively with Greyhound for the connections with other carriers of which MK&O had been deprived by Greyhound's 1963 and 1964 schedule changes. Greyhound immediately made tariff filings with the Interstate Commerce Commission, the Corporation Commission of Oklahoma and the Missouri Public Service Commission, seeking to terminate the 26-year optional honoring of tickets arrangement with MK&O (Allen ¶ 39 at 35; Hicks ¶¶ 6-8 at 4-5). This would have had the effect of preventing MK&O from accepting Greyhound or Greyhound-routed tickets without Greyhound's prior permission, thereby shifting the "option" from the passenger to Greyhound. The Commission first suspended and then disapproved Greyhound's proposed filing, and that is the decision involved here.[1]

Greyhound and Greyhound-routed tickets carried by MK&O under the optional honoring arrangement represented 26% of MK&O's gross passenger revenues in

---

[1] The Oklahoma Corporation Commission also required the continuation of optional honoring in Oklahoma intrastate commerce and its action was affirmed by the Oklahoma Supreme Court in *Greyhound Lines, Inc.* v. *Corporation Comm'n*, 430 P.2d 1 (Okla. 1967).

The Missouri Public Service Commission first held that Greyhound might terminate optional honoring only from those points where ticket agents were always available but then reconsidered and suspended the effectiveness of its decision to await the final outcome of the judicial review of the Interstate Commerce Commission decision involved here, apparently intending to adopt that result as its own. Optional honoring is therefore still effective in Missouri intrastate commerce (Mo. Pub. Serv. Comm'n Case No. B-24,122; see Order Extending Effective Date entered February 15, 1967).

1964; without those revenues MK&O would have operated at a substantial loss (Allen ¶ 35 at 33-34). MK&O's local service in areas where it is the only common carrier is subsidized by its St. Louis-Oklahoma City operations; the termination of optional honoring would severely impair MK&O's ability to maintain its service in those areas (Allen ¶ 36 at 34).

Under an antitrust consent decree entered in 1957,[2] Greyhound is forbidden to oust other carriers from Greyhound terminals, and MK&O presently operates from terminals also served by Greyhound.[3] This is because as a result of Greyhound's domination of the bus industry, by far the largest portion of the available traffic is brought into, attracted or directed to Greyhound terminals (Allen ¶ 21 at 26). However, over the years MK&O has experienced a continuing failure on the part of Greyhound personnel, and even Greyhound-influenced independent commission agents, to quote MK&O schedules and service which is competitive with that of Greyhound (Allen ¶ 23 at 27-28). If the passengers holding Greyhound or Greyhound-routed tickets were, in addition, to be deprived of the right, which they have under optional honoring, to use MK&O's service without prior Greyhound approval, the practical effect of this combination of circumstances would be to destroy MK&O as an effective competitor of Greyhound (Allen ¶ 23 at 27).

---

[2] *United States* v. *The Greyhound Corporation*, Civil Action No. 57-C-1107 (N.D. Ill., June 27, 1957) (MK&O Ex. 20).

[3] In August, 1964, MK&O was forced to terminate its service to the St. Louis Trailways Terminal, which it had served for over 30 years, as a condition to being permitted to use the new Greyhound St. Louis terminal (Allen ¶ 13 at 23).

The foregoing Statement has been limited to a summary of the evidence presented to the Commission demonstrating the detriment to MK&O which would flow from the termination of the practice of optional honoring. This is because the value to the ticket purchaser of the right to freely choose the carrier on which he will ride is sufficiently described in the Commission's decision (J.S. App. at 32, 33).

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Neither in the court below nor here does Greyhound dispute the factual basis for the Commission's decision. Its attack rests solely upon the legal proposition that the Commission has no authority to require the institution of an optional ticket honoring arrangement by a carrier; *ergo*, the Commission may not prevent the cancellation of a tariff provision embodying such a practice once established, regardless of its antiquity, its value to the public, the adverse effect of its cancellation upon other carriers and the public and the fact that the cancelling carrier has presented no factual justification whatsoever for its proposed termination.

Section 217(a) of the Motor Carrier portion (Part II) of the Interstate Commerce Act, 49 U.S.C. § 317(a), requires the filing of tariff provisions by motor common carriers. Section 217(c), 49 U.S.C. § 317(c), requires 30 days' notice of any proposed change in a "rule, regulation, or practice affecting . . . [a] rate, fare, charge, . . . or the value of the service thereunder." Greyhound apparently concedes (J.S. at 7) that these sections require the filing

with the Commission of tariff provisions embodying optional honoring arrangements and proposals to terminate such arrangements. It could hardly do otherwise at this point, since it faithfully maintained tariffs describing optional honoring in effect over the years, and carefully followed the statutory tariff change procedure when it sought to cancel the arrangement.

However, Greyhound denies the applicability to optional ticket honoring arrangements of Section 216(g), 49 U.S.C. § 316(g), which empowers the Commission to suspend and ultimately disallow proposed tariff changes which are not "just and reasonable," despite the fact that the pertinent language employed in Section 216(g) ("rule, regulation, or practice affecting . . . [a] rate, fare, or charge, or the value of the service thereunder") is identical with that in Section 217(c), the applicability of which is conceded by Greyhound. Greyhound also of necessity denies that Sections 216(a) and (e), 49 U.S.C. §§ 316(a), (e), could be interpreted to permit the Commission to require motor carriers of passengers to establish such arrangements as ticket optional honoring, although once again substantially the same, if not even broader, statutory language is there to be found.

Greyhound derives the gloss which assertedly causes language requiring the filing of optional ticket honoring tariff provisions under Sections 217(a) and (c) to be insufficient to give the Commission jurisdiction of such arrangements under Sections 216(a), (e) and (g), from authorities involving one specific form of joint traffic arrangement, the so-called "through route." To bolster this, Greyhound also invokes what it fondly hopes is a still vital

"brooding omnipresence" of the pre-Motor Carrier Act common law. It should be emphasized that no authority cited, be it statute or precedent, denies to the Commission jurisdiction over ticket honoring arrangements.

The Motor Carrier Act Commission decisions cited by appellant (J.S. at 7-8) relate only to the Commission's disclaimer of authority to require the maintenance of through routes between motor carriers of *property*, or motor carriers of property and water carriers. The provisions of Section 216(c), 49 U.S.C. ¶ 316(c), expressly state that the establishment of such through routes is optional on the part of the carriers. It is certainly a defensible interpretation on the Commission's part (no court has ruled on the question) that where the Congress has specifically stated its intention that the establishment of through routes between motor carriers of property and between such carriers and other types of carriers should be voluntary, the Commission should not prevent the termination of such through routes by a carrier which elects to do so. However, the statutory language carves out no such exception for ticket honoring arrangements.

The decisions applying the "short-haul" proviso of Part I of the Interstate Commerce Act, Section 15(4), 49 U.S.C. § 15(4), which limits the Commission's power to require the establishment of through routes and joint rates under Section 15(3), 49 U.S.C. § 15(3), discussed by appellant (J.S. at 10-11 & n. 1) are subject to the same infirmity as precedents. There Congress made unmistakably clear its intention that no carrier should be forced to "short-haul" itself by the Commission; hence, the Commission could not (until the amendment of Section 15(3)

by the Transportation Act of 1940, 54 Stat. 911 (1940)) in effect subvert the Congressional intent by forbidding the cancellation of "short-hauling" through routes voluntarily established by the carriers. There is no comparable expression of Congressional intent applicable to ticket honoring arrangements.

Apparently recognizing this flaw in the fabric of its argument, appellant then maintains that common law principles in some manner permeate the Motor Carrier Act of 1935 (49 U.S.C. §§ 301-27), and as a corollary to this contention, that the Motor Carrier Act confers no jurisdiction on the Commission over ticket honoring arrangements, because one carrier could not compel another to enter into such an arrangement under the common law (J.S. at 15-18). However, as this Court recognized with respect to the Motor Carrier Act of 1935 in *American Trucking Ass'n* v. *United States*, 344 U.S. 298, 309-10 (1953), and Part I of the Interstate Commerce Act, as amended, in *United States* v. *Pennsylvania R.R. Co.*, 323 U.S. 612, 616 (1945), the complexities of regulating common carriers of interstate traffic necessitate a broad statute which leaves substantial discretion to the Commission to interpret its provisions in the light of Congressional purposes and the public interest. To treat the comprehensive language of Sections 216(e) and (g) of the Motor Carrier Act of 1935, which was obviously intended to grant to the Commission a broad regulatory charter, as by implication limited in its scope by the pre-existing common law would constitute a perversion of the intent of the Congress.

In 1907, a purported restriction on the free transferability of railroad tickets was held to affect "the value of

the ticket" and was invalid since it was not contained in the applicable tariff. *B&O R.R. Co.* v. *Hamburger*, 155 F. 849, 851-52 (C.C.E.D. Va. 1907). This is closely analogous to the case at bar, because the practical effect of optional honoring is that the passenger transfers what would be his right to a refund of his unused ticket on one carrier to the carrier which in fact transports him, in payment for his transportation by the latter.

A tariff provision granting ticket purchasers the right to require the honoring of their tickets by two or more carriers is obviously a "rule, regulation or practice affecting . . . [a] rate, fare, or charge, or the value of the service thereunder" as described in Sections 216(e), (g), and 217(c). The Commission so found, and further found that Greyhound had not sustained its burden of demonstrating that the cancellation of this practice was "just and reasonable" (§ 216(g)) (J.S. App. at 32, 33-34). Greyhound does not challenge the factual basis of these findings.

There is no statutory limitation on the Commission's authority with respect to ticket honoring arrangements, such as is to be found in the case of through routes. Therefore, none of appellant's authorities are in point. Greyhound's understandable desire to impair MK&O's effectiveness as a competitor cannot serve to justify a tariff change which the Commission has found will harm both the public and MK&O (J.S. App. at 33-34). *Cf. United States* v. *American Railway Express Co.*, 265 U.S. 425, 436-38 (1924).

CONCLUSION

For the reasons stated above, the question presented by appellant is not substantial and the judgment of the district court should be affirmed.

Respectfully submitted,

JOHN L. ARRINGTON, JR.
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

Attorney for Appellee
Missouri, Kansas and Oklahoma
Coach Lines, a Corporation

Of Counsel:

STEPHANIE K. BARTLETT
510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

September, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (268 F. Supp. 746), dismissing an action brought to set aside an order of the Interstate Commerce Commission (J.S. App. B). The order denied Greyhound Lines, Inc., leave to cancel a tariff provision whereby Greyhound and another motor common carrier, Missouri, Kansas and Oklahoma Coach Lines (MK & O), mutually honor the tickets of each other (optional honoring) for passenger bus

286-486—67——1

service between Oklahoma City, Oklahoma, and St. Louis, Missouri, and all intermediate common points. Greyhound has thus been obliged to maintain the optional honoring provision in its tariff.

The optional honoring arrangement between Greyhound and MK & O, which has been in effect since 1939, permits a ticketholder, at his option, to take the bus of either carrier, regardless of which one issued him the ticket. The carrier performing the service is then reimbursed by the selling carrier for the value of the ticket less a commission. Since the optional honoring agreement constitutes a service or rule applied in connection with fares or charges, Greyhound was required to file the agreement with the Commission as part of its tariff. Section 217(a) of the Interstate Commerce Act, 49 U.S.C. 317(a); 49 C.F.R. 186.0(a).

Several years ago, conflicts developed in the relationship between Greyhound and MK & O and, in partial response thereto, Greyhound sought to terminate its optional honoring arrangement with MK & O. Accordingly, Greyhound filed with the Commission, under Section 217(c) of the Interstate Commerce Act, 49 U.S.C. 317(c), a proposed change to its existing tariff, eliminating the optional honoring arrangement, which was to become effective after thirty days.[1] Pursuant to Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), and Section

[1] Although Greyhound maintained optional honoring arrangements with numerous other carriers throughout the United States, it proposed to cancel at that time only the arrangement it had with MK & O.

1.42 of the Commission's General Rules of Practice, 49 C.F.R. 1.42, MK & O protested Greyhound's proposed tariff change, and the Commission, pursuant to Section 216(g), suspended the proposed change.

On written evidence, the Commission found (1) that it had jurisdiction, pursuant to Sections 217(c) and 216(g), because the cancellation of the optional honoring arrangement would involve a change in a rule or practice that Greyhound applied in connection with its fares which affected the value of the service thereunder; (2) that the traveling public would be materially injured by its termination because the ticket holders would have the utility of their tickets reduced, by no longer having available the large number of scheduled buses that were available under the arrangement; (3) that MK & O would be materially injured by a cancellation of the arrangement since its revenues would be seriously impaired, thereby threatening elimination of MK & O as an effective competitor of Greyhound between Oklahoma City and St. Louis;* and (4) that Greyhound, whose sole object in canceling the arrangement appeared to be to injure severely the smaller MK & O, had failed to sustain its burden under Section 216(g) of proving that the proposed change would be just and reasonable. On this basis the Commission ordered Greyhound to cancel the proposed tariff change.

---

*Moreover, there was threat to the traveling public in the Oklahoma area north and west of Tulsa and Oklahoma City, because said public was totally dependent upon MK & O for a local bus operation which MK & O supported by its operations between Oklahoma City and St. Louis (J.S. 31).

On Greyhound's petition to set aside the Commission's order, the three-judge court below unanimously affirmed the order, holding that the Commission had jurisdiction over the proposed cancellation of the optional honoring arrangement, even though it had been voluntarily established originally (J.S. 24). The court also upheld the Commission's finding that Greyhound had failed to meet its burden of proving the reasonableness of its proposed tariff change, especially in light of the substantial, unfavorable consequences the change would have occasioned for MK & O and the traveling public (J.S. 23-24).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's finding that appellant had not shown its proposed tariff change to be just and reasonable lies within its exclusive province and, as unanimously determined by the court below, represents a reasonable exercise of its judgment and discretion. *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 285-286; *Western Paper Makers' Chem. Co.* v. *United States*, 271 U.S. 268, 269, 270; *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *affirmed per curiam*, 385 U.S. 203; *Baltimore & O. R.R.* v. *United States*, 249 F. Supp. 712 (W.D. Pa.), *affirmed per curiam*, 385 U.S. 3.

The Commission is vested with the exclusive power to suspend and investigate a proposed rate or fare change. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 662. When it does so the burden

of proving that the change is just and reasonable rests upon the carrier proponent. 49 U.S.C. 316(g). *A.T. & S.F. Ry. Co.* v. *United States*, 279 U.S. 768, 773; *Accelerated Transport-Pony Express, Inc.* v. *United States*, 227 F. Supp. 815, 819–820 (D. Vt.), *affirmed per curiam*, 379 U.S. 4.

Appellant argues, however, that the Commission could not have initially compelled it to enter into an optional honoring agreement and, therefore, the Commission may not preclude it from withdrawing from such an arrangement. But as the court below noted the question of the Commission's power to preclude a carrier from withdrawing from such an arrangement is discrete from the question of its power initially to compel such arrangement (J.S. 21).

The clear language of the Act provides that once a tariff has been filed by a carrier, the Commission may preclude the carrier from changing any part of its operation under that tariff "affecting * * * the value of the service thereunder" unless the carrier can establish that the change is just and reasonable. 49 U.S.C. 316(g), 317(c).

Appellant's tariff change proposed to eliminate, without any modification in the fare, the optional honoring arrangement that appellant had for years offered to its patrons in cooperation with MK & O. The Commission found this arrangement to be of considerable value to prospective passengers, because it gave them a wider choice of schedules and afforded them better service to a greater number of intermediate points than if their purchase of tickets con-

fined them to the buses of the issuing carrier only (J.S. 33). Therefore, the "value of service" as prescribed by Sections 217(c) and 216(g) would have been adversely affected by the cancellation of the optional honoring plan. Thus the Commission did have jurisdiction under the statute to preclude appellant from canceling its optional honoring arrangement with MK & O. Cf. *Baltimore & O. R. Co.* v. *Hamburger*, 155 Fed. 849, 851–52 (E.D. Va.).[3]

[3] The cases on which appellant relies to support the contention that the Commission may not preclude the termination of a service which it could not initially compel all involved a statute (49 U.S.C. 316(c)) which is construed to prohibit the Commission from compelling the institution of through route arrangements between common carriers of *property* (J.S. 22–23). As the court below recognized (J.S. 23) these cases are distinguishable because no similar prohibition exists with respect to motor carriers of *passengers* regarding either through routes (see 49 U.S.C. 316(a)), or other rules and practices that may apply in connection with fares and charges. See, *e.g.*, *United States* v. *Capital Transit Co.*, 325 U.S. 357, 362–363; *Restriction To Through Routes, Thunderbird Transp. Co.*, 313 I.C.C. 271, 273–274.

CONCLUSION

The judgment of the court below should be affirmed.

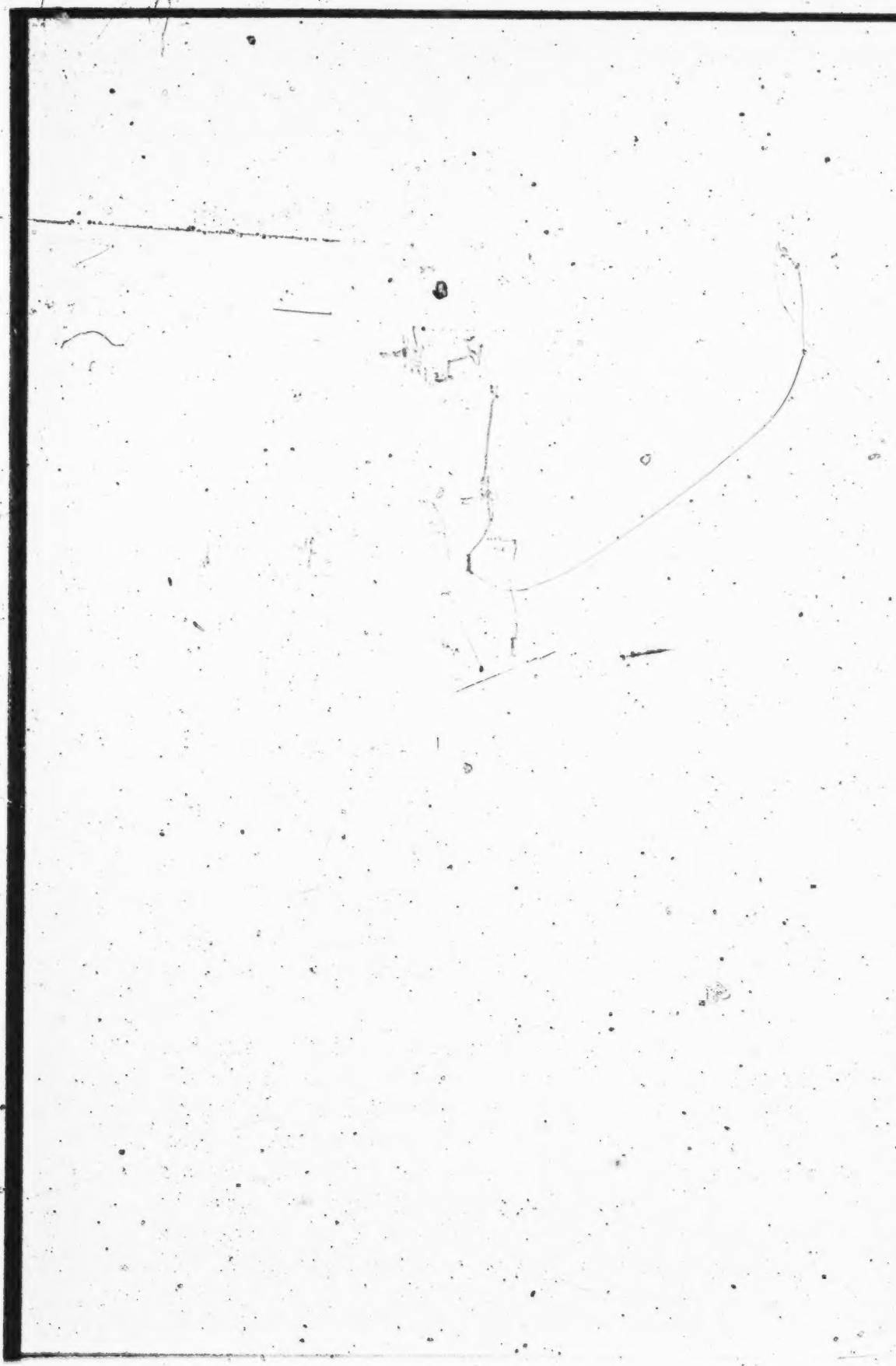
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
RICHARD A. WEGMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
RAYMOND M. ZIMMET,
Attorney,
Interstate Commerce Commission.

OCTOBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967



In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC.,

Appellant,

VS.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
MISSOURI, KANSAS AND OKLAHOMA COACH LINES,
A Corporation,

Appellees.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

BRIEF OPPOSING MOTIONS TO AFFIRM

This brief opposes the motion to affirm of the United States and the Interstate Commerce Commission (Government), and the motion of Missouri, Kansas and Oklahoma Coach Lines (M. K. & O.).

Appellees express no disagreement with our statement of the question presented on page 2 of our jurisdictional statement. Appellees tacitly acknowledge that the Commission lacks power to compel institution of optional honoring arrangements initially; indeed, the Commission did not claim that power as a basis of its order. And appellees admit the correctness of the Commission decisions cited in pages 6 to 11 of our jurisdictional statement (Govt. p. 6; M. K. & O. p. 8).

ARGUMENT

Appellees present no reasons that warrant affirmance of the judgment below.

1. The Government (pp. 4-6) and M. K. & O. (p. 10) argue that since the Commission found that cancellation of optional honoring would affect the value of the service to the ticket holder, the Commission had power to prevent cancellation under its authority to regulate rates. That contention has no merit, and no authorities support it. In the Commission decisions which we cite (J. S. pp. 6-11), and which appellees do not challenge, the Commission held for more than fifty years, and until the case at bar, that it was powerless to prevent cancellation of a joint traffic arrangement that it could not initially compel, *even though the effect of that cancellation was the imposition of higher rates on shippers.* The general principle was stated as follows in *Port of New York Authority* v. *A. T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517 (1928):

> "In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition."

In *Restrictions, Riss & Co., And Eliminations, Hi-Way Motor,* 46 M. C. C. 290 (1946), the Commission held that it had no power under § 216(g) to compel continuance of a joint traffic arrangement which it could not have initially required, even though discontinuance of the arrangement would impose upon shippers a combination of local rates higher than the joint rate theretofore applicable over the

discontinued through route. (See in the certified record the order of the Commission in *Riss, supra*, dated Nov. 29, 1946.) The Commission reached the same conclusion in two other cases cited on page 8 of our jurisdictional statement, *East South Joint Rates*, 44 M. C. C. 747 (1945), and *Southeast Shippers Assn.*, 54 M. C. C. 770 (1952).

One of the cases cited by the Government (p. 4), *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658, 663 (1963), points out that the power to investigate and determine the validity of proposed rates was first conferred upon the Commission in 1906, and that the power to suspend rates during the investigation was given to the Commission in 1910. The amendment of 1910 added, *inter alia*, the following provision to § 15 of the Act:

> "At any hearing involving a rate increased . . . after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier . . ." (36 Stat. 552).

It is obvious that that provision is the direct ancestor of § 216(g).

Thus, *Port of New York Authority, supra*, and the other decisions cited in our jurisdictional statement, page 11 and note 1, were decided in a statutory framework similar to that of the case at bar.

The cases cited by the Government (pp. 4-5) involved rates, which are initially and at all times subject to the jurisdiction of the Commission. No carrier may operate unless it files rate tariffs. But a carrier may operate without entering into optional honoring arrangements with another carrier, and without entering into other voluntary joint traffic arrangements. There is obviously a difference

between the ordinary regulation of rates and the attempted use of rate regulatory power to extend the Commission's jurisdiction over voluntary joint traffic arrangements which the Commission has no power to compel. The Commission had always held until the case at bar that its rate regulatory power did not authorize it to forbid carriers to discontinue a joint traffic arrangement with another carrier that the Commission could not have compelled initially. The Commission's long continued holding was in accord with the common law as explained in our jurisdictional statement, pages 15-18.

2. Referring for authority to the District Court's opinion, the Government says (p. 5) that the question of the Commission's power to preclude a carrier from withdrawing from an optional honoring arrangement "is discrete from the question of its power initially to compel such arrangement." It is highly significant that the only authority the Government can cite for that principle is the opinion that is here on appeal. All of the other cases that have considered this question are the other way; they hold that if a carrier cannot be compelled to enter into a joint traffic arrangement with another carrier, it cannot be compelled to continue such arrangement voluntarily made (J. S. pp. 6-16).

3. The Government (p. 6) attempts to distinguish the motor carrier cases upon which we rely (J. S. 7-9) by saying that they involved motor carriers of property as to which through route arrangements are voluntary under § 216(c), whereas under § 216(a) passenger motor carrier through routes may be compelled. That analysis is unsound. All appellees admit that optional honoring may not be initially compelled by the Commission. Thus, optional honoring is precisely similar to property motor carrier

through routes in that neither of these joint traffic arrangements may be compelled and therefore the Commission cannot forbid their discontinuance. It is significant in this connection that the Commission in its Report (J. S. pp. 25-34) did not claim that § 216(a) or any other statute empowers the Commission to compel institution of optional honoring arrangements.

4. M. K. & O. attempts to distinguish the cases upon which we rely in pages 6 to 12 of our jurisdictional statement by saying (pp. 8-9) that while the Act makes it plain that the motor carrier and railroad through route arrangements considered in those cases should be voluntary, "the statutory language carves out no such exception for ticket honoring arrangements." That reasoning is unsound. The important consideration is that the Act does not give the Commission power to compel carriers to enter into optional honoring arrangements. It is therefore unnecessary for the Act to "carve out" an exception. In the silence of Congress the matter of optional honoring arrangements is left to the common law (J. S. pp. 15-18), and the situation is the same as if the Act had affirmatively stated that such arrangements should be voluntary.

5. The Government (p. 6) and M. K. & O. (p. 10) cite *Baltimore & Ohio R. R. Co.* v. *Hamburger*, 155 Fed. 849 (E. D. Va. 1907). That case involved a rule limiting or preventing the transfer of a ticket from the purchaser to another person. It involved only the issuing carrier. It did not have anything to do with arrangements between two carriers, whereas in the case at bar the dispositive issues are entirely concerned with joint traffic arrangements between carriers. There is a wide difference between the two situations.

6. M. K. & O. argues (p. 9) that the Commission has been vested with discretionary powers broad enough to justify its order. That contention is without merit. Discretionary powers must rest on some statutory foundation. The Commission has no jurisdiction over any joint traffic arrangements between carriers in the absence of statutes conferring that jurisdiction (J. S. 15-18). The Commission's order in *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612 (1945), cited by M. K. & O. (p. 9), rested on a solid foundation of statutes giving the Commission power to compel railroads to enter into through route-joint rate arrangements with water carriers. There is no statutory foundation for compulsory optional honoring arrangements.

7. Finally, to affirm the District Court's judgment would be to upset fifty years of highly important precedent upon which carriers have come to depend. As the cases we cite indicate, carriers for many years have been going into voluntary joint traffic arrangements with other carriers in the expectation that they could withdraw at will. A probable result of affirmance would be the trapping of a huge number of carriers, to their surprise and dismay, in voluntary joint traffic arrangements from which they can escape only by the Commission's leave. Another result would be to deter carriers from entering into future arrangements of that kind. In view of the long course of Commission and judicial decision which is opposed to the Commission's order (J. S. pp. 6-18), and in consideration of the importance of the case to the transportation industry, plenary consideration is warranted.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

AMOS M. MATHEWS

ROBERT J. BERNARD

Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

GREYHOUND LINES, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 555. Decided December 4, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.